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No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

TERRY J. HARRINGTON
AND CURTIS W. MCGHEE JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEFS IN OPPOSITION

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MISCELLANEOUS

Jacob Paul Goldstein, Note, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643 (2006) 7

Respondents' briefs simply confirm the certworthiness of the question presented: whether a prosecutor's liability, if any, for procuring false evidence prior to an arrest or charges may be leveraged into liability for a wrongful conviction.

In answering yes, the Eighth Circuit sharply departed from other courts of appeals and from this Court's precedents. Although the courts below nominally acknowledged that a prosecutor has absolute immunity for using false evidence at trial, they effectively overrode that immunity with a "substantive due process" theory, under which false evidence works one, continuous constitutional violation starting before arrest and continuing through conviction and incarceration. They also borrowed—and expanded—the Second Circuit's theory of a constitutional "right," unknown in this Court's cases, "not to be deprived of liberty as a result of the fabrication of evidence by a [prosecutor] acting in an investigating capacity." See Pet. App. 18a; *Zahrey*, 221 F.3d at 349.

Petitioners recognize that respondents have suffered substantial harms. But respondents may not evade review of the decision below—and the circuit split it enlarges—by mounting an assault on the very principle of immunity (*e.g.*, McGhee Opp. 18-21) or dismissing it as a "legal technicalit[y]" (*id.* at 33). As this Court has recognized, the federal judiciary is not empowered to fashion compensation schemes for wrongful conviction in the absence of a cognizable cause of action under § 1983. *Briscoe* v. *LaHue*, 460 U.S. 325, 344 n.30 (1983). Moreover, upholding prosecutorial immunity principles in this case would not deprive respondents of a remedy because it would not affect their separate claims, governed by different principles, against police defendants.

Recognizing the importance of the issues raised by the Eighth Circuit's decision and the serious risk that it may wrongfully expose petitioners to trial and damages, Justice Alito ordered a stay on the proceedings below. See *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (stay is granted only where there is a "reasonable probability" that four Justices will vote to grant certiorari and a "fair prospect" that a majority of the Court will find that the decision below was erroneous). As *amici* federal and state prosecutor groups explain in their brief (1-6), the issues here have grave, far-reaching ramifications in an area of law marked by frequent litigation. This reply explains why respondents' arguments against review have no merit.

1. Respondents brush aside the circuit split that is widened and deepened by the Eighth Circuit's decision. Harrington (at 12) calls the split "illusory"; McGhee (at 3) belittles the Seventh Circuit's decision in *Buckley II* as "an isolated aberration." These characterizations do not withstand scrutiny. Moreover, McGhee's insistence (at 14-16) that *Buckley II* was wrongly decided and that the Eighth Circuit came to a better conclusion simply underscores the need for this Court's intervention.

The two-part holding in *Buckley II*—that procurement of false evidence during an investigation does not in itself violate a criminal defendant's constitutional rights, and that introduction of the same evidence by a prosecutor at trial is covered by absolute immunity—is far from an "aberration." In 2006, the Third Circuit applied *Buckley II*—together with its own decision in *Michaels*, which had followed *Buckley II*—in concluding that impermissible interrogation techniques used on third parties do not vio-

late a criminal defendant's constitutional rights. *Yarris* v. *County of Delaware*, 465 F.3d 129, 143 (3d Cir. 2006). Accordingly, the court held, officers who had conducted the interrogation in question were entitled to qualified immunity, and prosecutors who introduced the evidence were entitled to absolute immunity. *Ibid.*

Although it did not rely on *Buckley II*, the Ninth Circuit employed a similar analysis in *Milstein* v. *Cooley*, 257 F.3d 1004, 1012 (9th Cir. 2001). It held that a prosecutor was protected by absolute immunity where he had allegedly directed an investigator to sign a complaint, leading to a criminal information, even though the prosecutor knew the complaint was false.

To be sure, other courts have disagreed with the approaches of the Third, Seventh, and Ninth circuits. For example, in *Clanton* v. *Cooper*, 129 F.3d 1147, 1157 (10th Cir. 1997), the Tenth Circuit held that an unsuccessfully prosecuted defendant could pursue damages on the theory that a government officer's coercion of a statement from a third party nonetheless violated the defendant's Fourteenth Amendment rights. And the Second Circuit in *Zahrey* expressly rejected the core conclusion of *Buckley II*, 20 F.3d at 796, that "events not themselves supporting recovery under § 1983 do not become actionable because they lead to injurious acts for which the defendants possess absolute immunity." The Second Circuit established a dramatically different rule: that prosecutors are liable for harms they cause during the judicial phase of a proceeding (in that case, an indictment) because it is "reasonably foreseeable" that evidence they gather in their investigative role will be used in their advocacy role. *Zahrey*, 221 F.3d at 354.

Justice Thomas recognized that *Clanton* and *Zahrey* were incompatible with *Buckley II* and *Michaels* and urged that certiorari be granted to resolve the four-circuit conflict. *Michaels* v. *McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari). The Eighth Circuit's decision in this case exacerbates that conflict, and *Milstein* adds a further wrinkle.

In sum, the circuits are hopelessly fractured in their approaches to a prosecutor's liability for investigative acts that lead—actually, or just potentially—to harms during the judicial phase. This case presents a particularly strong vehicle for resolving that conflict. Unlike *Clanton* and *Zahrey*, which involved prosecutions that ended without convictions, the decision below is the first that would allow plaintiffs to pursue wrongful-conviction damages based on acts that were subject to qualified immunity.

2. Respondents contend that an outcome other than the one reached by the Eighth Circuit would conflict with this Court's decision in *Buckley*. But contrary to respondents' characterization, petitioners seek no "retreat from" *Buckley*. See McGhee Opp. 18. Petitioners do not confuse a prosecutor's investigative and advocacy roles; nor do they argue that absolute immunity should retrospectively immunize activities outside the judicial process.

Buckley does not address the critical question in this case: whether an investigating prosecutor who procures false evidence prior to an arrest or charges may be answerable in damages not just for wrongful *initial* detention, but for wrongful *conviction*. In answering yes, the Eighth Circuit effectively held that when a prosecutor commits a misdeed under qualified immunity, the consequences spread forward and

prospectively overcome absolute immunity for use of the evidence at trial. See Pet. App. 18a (prosecutor is liable for "deprivation of liberty" where he is "accused of *both* fabricating evidence and then *using* the fabricated evidence *at trial*") (emphasis added). Under the dissent's theory in *Buckley II*, which was adopted below, the initial procurement of false evidence "ripen[s] into a § 1983 cause of action" when the evidence is introduced. *Id.* at 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)). Accordingly, McGhee concedes (at 25) that the reason the injury here "went beyond" false arrest was because the prosecutors "*also used* the fabricated evidence to deprive Harrington and McGhee of a *fair trial*" and thus "*to cause* their wrongful convictions" (emphasis added). *Buckley* supports no such theory of liability. Respondents' argument would effectively erase this Court's "function test" for prosecutorial immunity.

Respondents seek support for their view from *Milstein* and *Moore* v. *Valder*, 65 F.3d 189 (D.C. Cir. 1995). In reality, these decisions *undermine* respondents' position, and they provide examples of the type of exacting analysis that the Eighth Circuit failed to conduct.

In *Milstein*, the Ninth Circuit held that a prosecutor is not absolutely immune for fabrication of evidence. 257 F.3d at 1011. But it also recognized that absolute immunity for judicial proceedings could not be abridged even where criminal charges were based on a false complaint that a prosecutor had directed an investigator to sign. *Id.* at 1012. Thus, the Ninth Circuit did not endorse respondents' liability theory—which is also the theory of the Second Circuit and the courts below—that "[b]ut for" charges that

were based on false evidence, respondents would not have suffered harms later in the judicial process. (McGhee Opp. 14.)

In *Moore*, 65 F.3d at 194, the D.C. Circuit said that although absolute immunity would not apply to a prosecutor's "misuse of *investigative* techniques," the prosecutor's "decisions regarding what evidence to put before [a judicial proceeding], and in what manner" are absolutely immune under *Imbler*. There was no conviction or post-trial incarceration in *Moore*, and no theory that bad evidence could have "ripened" into some other violation. Thus, *Moore* cannot support the Eighth Circuit's conclusion that a wrongful investigation may expose prosecutors to the sort of unbounded liability that respondents seek license to pursue here.

Were respondents' claims limited to false arrest, immunity would be more fact-dependent. See *Buckley*, 509 U.S. at 274 (prosecutor does not have absolute immunity "before he has probable cause to have anyone arrested"); *cf. Milstein*, 257 F.3d at 1012 (absolute immunity applied where an arrest warrant followed from a criminal complaint for which prosecutor was immune, even though prosecutor knew the complaint was false). But injuries arising from a prosecution are "'entirely distinct'" from false arrest. *Wallace*, 549 U.S. at 390. Nothing in this Court's § 1983 jurisprudence suggests that liability for wrongful conviction may be founded on a wrongful investigation while disregarding all subsequent events during the judicial phase of a prosecution.

This issue is the crux of the conflict between the Eighth Circuit's decision in this case, which was grounded in the logic of *Zahrey*, and the rulings in

Buckley II, *Michaels*, and *Milstein*. The issue is a critical one and warrants review.

3. McGhee (at 29) frames the false-evidence issue in this case as one of Fourth Amendment malicious prosecution (although respondents' complaints do not allege state-law malicious prosecution against petitioners). The courts below, too, apparently (and incorrectly) viewed the false-evidence claim through a lens of wrongful institution of criminal proceedings. That would explain how the Eighth Circuit concluded that a prosecutor who is absolutely immune at trial could still face damages for wrongful conviction based on pre-arrest procurement of evidence.

The smuggling of malicious-prosecution concepts into this case provides an independent reason why certiorari should be granted. This Court recently noted that it has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983" (*Wallace*, 549 U.S. at 390 n.2), and the circuits have taken widely divergent approaches. See Jacob Paul Goldstein, Note, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643, 653-659 (2006) (surveying the various approaches and concluding that "[t]he status of malicious prosecution as a constitutional tort is rife with confusion").

In this case, the Eighth Circuit echoed the Second Circuit's view in *Zahrey* that it would be "perverse" to "hold liable the [police officer] fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the [prosecutor] who enlists himself in a scheme to deprive a person of liberty." Pet. App. 18a. But such a scenario is not, as these Courts suggest, an anomaly. The act of procuring false evidence in itself violates no constitutional right (*Buckley*, 509

U.S. at 281 (Scalia, J., concurring)), but when the police officer hands the bad evidence to a prosecutor and charges ensue, the officer commits the common-law tort of wrongful institution of criminal proceedings. By contrast, in a § 1983 action, the prosecutor's charging decision is categorically immune under *Imbler,* even if the prosecutor knows the evidence is bad. See *Kalina*, 522 U.S. at 124-125.

This issue adds to the circuit split addressed above and in the petition. In *Buckley II*, 20 F.3d at 796-797, the Seventh Circuit explained that while a police officer could be liable for misleading a prosecutor, a prosecutor who himself procures bad evidence would *not* be liable, because any constitutional injury would result only from an immunized prosecutorial decision such as filing charges. See also *Lee* v. *Willins*, 617 F.2d 320, 322 (2d Cir. 1980) (where an investigating prosecutor procured false evidence, *Imbler* barred recovery for the criminal defendant's deprivation of liberty in having to stand trial). Such an analysis draws support from this Court's opinions in *Malley* v. *Briggs*, 475 U.S. 335, 342-343 (1986), which emphasized the different roles played by police officers and prosecutors in the judicial process, and *Kalina*, 522 U.S. at 129-131, which distinguished between acts performed by the same prosecutor in attesting to facts as a witness (which warranted qualified immunity) and initiating the prosecution (which had absolute immunity).

Thus, even if the Fourth Amendment supports a § 1983 action for malicious prosecution, allowing such a claim against a prosecutor in these circumstances would swallow up *Imbler*. It would defeat the very rationale for absolute immunity by exposing prosecutors to the risk of having their charging deci-

sions second-guessed in civil litigation. The Eighth Circuit's adoption of *Zahrey* and rejection of *Buckley II* makes that risk a reality and further supports this Court's review of the decision below.

4. Respondents rely on the statement in *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Harrington Opp. 13-14; McGhee Opp. 15-16. But that statement pertained to whether a § 1983 action requires a showing of specific intent. *Monroe*, 365 U.S. at 187. It does not authorize broad, generalized federal tort claims unmoored from specific federally protected rights.

A § 1983 plaintiff must show that state action deprived him of a "specific constitutional guarantee." *Paul* v. *Davis*, 424 U.S. 693, 700 (1976). Although there is certainly a procedural due process right not to be convicted based on false evidence, McGhee's discussion of *Mooney* (at 11-13) is unavailing because that case was about the kind of *trial* violation for which, under *Imbler*, a prosecutor is absolutely immune. Respondents' suggestion that a conviction is a "natural consequence[]" of the procurement of false evidence is simply an attempted end run around such trial immunity. There is no support from this Court for such a flawed theory of proximate cause.

Applying the common law tort principle of "natural consequences" in the way respondents suggest would fly in the face of this Court's teaching that § 1983 is not a "font of tort law." *Paul*, 424 U.S. at 701. It also would effectively abrogate a number of this Court's precedents, starting with the teaching of *Wallace* that a false arrest in violation of the Fourth Amendment does not "set the wheels in motion for

[a] subsequent conviction and detention." 549 U.S. at 391. And it would contradict this Court's repeated instruction that alleged constitutional violations must be described with particularity. See, *e.g.*, *Albright*, 510 U.S. at 273 (plurality opinion).

Nor may respondents rely on a sweeping theory of substantive due process to argue that procurement of false evidence set the wheels in motion for what they characterize as a "continuous injury" that extended from arrest through post-conviction relief. McGhee Opp. 28. In *Chavez* v. *Martinez*, this Court held that a statement given without *Miranda* warnings did not in itself violate a suspect's Fifth Amendment right against self-incrimination where the statement was never used in any criminal proceeding. 538 U.S. 760, 773 (2003). Although the Court said the suspect could pursue a substantive due process claim against police for coercing the statement while he was in severe pain, *id.* at 779-780, that proposition is far different from the one urged by respondents and endorsed by the court below: that substantive due process may effectively overcome absolute immunity and support liability where a prosecutor is "accused of both fabricating evidence and then using the fabricated evidence at trial." Pet. App. 18a.

5. Harrington suggests (at 24) that certiorari may be premature because this is an "interlocutory" (actually, a collateral-order doctrine) proceeding, and that trial "could yet obviate the need to address" the immunity issues in this case. Harrington misapprehends the principle of immunity: it is "*immunity from suit* rather than a mere defense to liability," and regardless of the outcome on the merits, immunity "is effectively lost if a case is erroneously per-

mitted to go to trial." *Scott* v. *Harris*, 127 S. Ct. 1769, 1773 n.2 (2007).

Respondents also wrongly contend that they are entitled to a trial against the county regardless of how the prosecutors' immunity defenses are resolved. Harrington Opp. 6; McGhee Opp. 32. Respondents' remaining claims against the county are based on indemnification, failure to train, and *Monell* theories. The viability of these claims necessarily depends on resolution of the issues in the petition and whether there remains any injury that is cognizable under § 1983.

6. Finally, respondents repeatedly say that petitioners "admit" the allegations against them; have "conceded Plaintiff[s'] version of the facts" (Harrington Opp. 10); have "waived" critical defenses (*id.* at 7); and "admit they had no probable cause" (McGhee Opp. 21). These assertions are false. Petitioners consistently have maintained that *even if* the alleged facts were true, respondents' claims must fail because petitioners are immune as a matter of law. Seizing on that "even if" position, plaintiffs moved in the district court to have all their allegations accepted as judicial or evidentiary admissions, a ploy that the district court rejected.[1]

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[1] Nor did petitioners "concede[]" in the court of appeals that respondents "were entitled to trial on their Section 1983 claims." McGhee Opp. 22. McGhee refers to a rehearing request filed by petitioners which addressed state sovereign immunity issues unrelated to the federal issues here. What petitioners actually said in that filing was that sovereign immunity under Iowa law does not affect the separate federal claims. Acting on the rehearing petition, the Eighth Circuit vacated its initial opinion and issued the decision of November 21, 2008, which is the sub-

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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ject of this petition. The parts of the initial opinion dealing with federal immunity issues were unaffected.